Supreme Court, U.S.
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No. 90-1295

In The

Supreme Court of the United States

October Term, 1990

WILLIAM A. COHN,

Petitioner,

vs.

RALPH SHANKMAN,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the failure to afford a litigant a separate hearing to determine if Rule 11 sanctions should be imposed is a denial of due process.

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The Respondent, Ralph Shankman, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Order of the Supreme Court of Tennessee entered in the above entitled case on November 19, 1990.

STATEMENT OF THE CASE

This case began on November 2, 1987 as a divorce action brought by Leslie Shankman Cohn against Petitioner William A. Cohn in the Chancery Court of Shelby

County, Tennessee. Petitioner filed an answer and, at a later date, filed a third party complaint against Respondent, Ralph Shankman, the father of Leslie Shankman Cohn, seeking to place restrictions on Respondent's visitation rights with Petitioner's minor children. Respondent filed an answer to the third party complaint and a counterclaim alleging that the relief sought by Petitioner in the form of an injunction and restraining order was without basis in fact or law and was malicious in nature. The counterclaim sought an award of costs, expenses and attorneys' fees.

At trial, the proof showed that Respondent had been generous in financially assisting his daughter and Petitioner during their marriage. Witnesses for both Petitioner and his wife, including Petitioner's own mother and one of his former law associates testified that Respondent was a good and loving grandfather who had a genuine interest in the welfare of his grandchildren. Although Petitioner, in his testimony expressed concern about his children being around some of Respondent's friends because of their so-called lifestyle, there was nothing in the record to indicate that any of these friends, who were well-to-do businessmen and friends of both Respondent and his wife, had done anything unusual around the children. Petitioner conceded at trial that at no time during the marriage and before the separation did he voice any objections regarding the children being around Respondent or any of his friends. It was only after the separation that Petitioner made threats to his wife about Respondent's friends and subpoenaing them to Court.

At the close of Petitioner's proof, the trial judge granted Respondent's motion to dismiss finding that there was no evidence that the children had been exposed to anyone's life style that was inappropriate or that there had been any misconduct on the part of Respondent. Pursuant to Respondent's counterclaim, the Court instructed counsel to submit an affidavit for attorneys fees.

Following the trial which took place on August 25 and 26, 1988, the Court filed its memorandum decision on October 17, 1988 confirming that the third party action against Respondent should be dismissed, and holding that it was frivolous, had no basis in fact or law, was malicious in nature and would be subject to Rule 11 Sanctions. The Court further found that since the pleading was authorized by Petitioner who was a member of the bar and signed by him, he was ordered to pay attorneys' fees in the amount of $5,000. A final decree was entered on October 31, 1988.

Petitioner appealed the final decree to the Court of Appeals of Tennessee raising the questions of notice and denial of the opportunity to be heard on the Rule 11 sanctions. Petitioner cited no authorities in support of his position. The Court of Appeals affirmed the trial court, finding that there was no basis in fact or law for Petitioner's allegations against Respondent and that sanctions should be imposed. The Court of Appeals further held that Petitioner was on notice of the relief sought which was in the nature of Rule 11 sanctions and that the trial court entered its order only after a trial on the merits.

Petitioner then filed an application for permission to appeal to the Supreme Court of Tennessee raising the same issues. Again Petitioner cited no authorities. On November 19, 1990, the Supreme Court denied the application.

REASONS FOR DENYING THE WRIT

Since the order of the Tennessee Supreme Court denying Petitioner's application for permission to appeal the findings of the Tennessee Court of Appeals is correct and conflicts with no decision of this Court, further review by this Court is not warranted.

Petitioner contends that he should have been given notice that the trial court was considering imposing Rule 11 sanctions and accordingly afforded a meaningful opportunity to be heard. He maintains that if given notice and an opportunity to be heard *in camera*, "he would have explained his conduct and would have presented proof of facts and circumstances from privileged files, work product and otherwise, which while not necessarily relevant to the issues at trial, would have shown that Petitioner's third party complaint had a solid basis in both fact and law." (Petition for Writ of Certiorari pps. 13-14). The trial lasted two days. Petitioner had ample opportunity to introduce proof regarding his third party action against Respondent. It is not clear what is meant by "privileged files" and "work product" in the context of this case. Furthermore, it is difficult to understand why this proof would be relevant in a Rule 11 sanctions hearing and not

the trial itself, and why it was not introduced at the trial either *in camera* or otherwise.

There have been several cases dealing with the issue of notice and a hearing in connection with Rule 11 sanctions. Some courts have held that the imposition of sanctions without affording prior notice and a meaningful opportunity to be heard is a denial of due process. *Jensen v. Federal Fund Bank of Omaha*, 882 F.2d 340, 341 (8th Cir. 1989); *Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc.*, 834 F.2d 833, 836 (9th Cir. 1987); *Sanko S.S. Co.. Ltd. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987).

To the contrary, other Courts have held that the right to notice and a hearing depends on the circumstances of the case. In *Harmony Drilling Co., Inc. v. Kruetter*, 846 F.2d 17, 19 (5th Cir. 1988) the court found that not all cases required the giving of notice before applying Rule 11 sanctions. While the courts may be split on the notice requirement, Respondent submits this is not an issue in the case at hand. From the outset, Petitioner knew from Respondent's counterclaim to the third party complaint that Respondent was contending that the action was without basis in fact or law, was malicious in nature and that he was entitled to attorneys' fees. The Tennessee Court of Appeals specifically found that Respondent's "requested relief was in the nature of a Rule 11 sanction" and Petitioner "was clearly on notice thereof". (Opinion of Court of Appeals of Tennessee).

With regard to a hearing, the Court in *McLaughlin v. Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir. 1986) held that the scope of the sanction proceedings was limited to the

record. This was based in part upon the advisory committee's note to the 1983 amendment to Rule 11 and also the fact that the offending party offered no basis for any further proceedings on the matter. See also *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2nd Cir. 1986), *cert. denied sub nom., County of Suffolk v. Graseck*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987) (where the Court rejected the notion that an evidentiary hearing was required to impose Rule 11 sanctions); *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205-06 (7th Cir. 1985) (hearing not required under the circumstances); *International Shopping v. Hydra Offshore, Inc.*, 875 F.2d 388, 392 (2d Cir. 1989) (evidentiary hearing not required to impose sanctions for failing to conduct proper inquiry into subject matter jurisdiction); *Westmoreland v. CBS. Inc.*, 770 F.2d 1168, 1178 (D.C. Cir. 1985) (concluding that due process satisfied where parties had opportunity to brief issue of sanctions on appeal).

Rule 11 and the advisory committee's note contemplate that courts should be given latitude in determining if a separate hearing should be afforded the offending party prior to imposing sanctions. To the extent possible, the inquiry should be limited to the record. Petitioner had ample opportunity to support his case at trial. He had his day in court. Under the circumstances, Petitioner is not entitled to another hearing. As the Court concluded in McLaughlin, while it is conceivable that due process would require a hearing in certain cases, here Petitioner offers no basis for any further proceedings. 803 F.2d at 1205.

The Tennessee Supreme Court's Order is in accord with applicable decisions of this Court and there are no

special or important reasons warranting briefs on the merits and oral arguments in this matter.

CONCLUSION

Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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